No. 03-1389

In the Supreme Court of the United States

JUDICIAL WATCH, INC., PETITIONER

v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Freedom of Information Act allows the government to withhold from disclosure information contained in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(6). The question presented is:

Whether Exemption 6 of the Freedom of Information Act allows the government to withhold the names of lower-level clerical employees of the government identified in Internal Revenue Service correspondence or a correspondence control log.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is not published in the *Federal Reporter*, but is *reprinted in* 84 Fed. Appx. 335. The opinion and order of the district court (Pet. App. 15-33) are unreported.

JURISDICTION

The court of appeals entered its judgment on January 6, 2004. The petition for a writ of certiorari was filed on April 5, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In enacting the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended by the Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No.

107-306, § 312, 116 Stat. 2390-2391, Congress "balance[d] the public's need for access to official information with the Government's need for confidentiality." *Weinberger* v. *Catholic Action*, 454 U.S. 139, 144 (1981). While FOIA generally calls for "broad disclosure of Government records," Congress also "realized that legitimate governmental and private interests could be harmed by release of certain types of information." *Department of Justice* v. *Julian*, 486 U.S. 1, 8 (1988) (internal quotation marks and citations omitted). In particular, "[a]t the same time that a broad philosophy of 'freedom of information'" was enacted into law, Congress sought to "protect certain equally important rights of privacy with respect to certain information in Government files." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) (quoted in *Department of the Air Force* v. *Rose*, 425 U.S. 352, 372-373 n.9 (1976)); see also S. Rep. No. 221, 98th Cong., 1st Sess. 21 (1983) ("Since passage of the FOIA in 1966, Congress has recognized the need to balance an open government philosophy against legitimate concerns for the privacy of individuals.").

Accordingly, because "public disclosure is not always in the public interest," Congress provided in FOIA Exemption 6 that information contained in "personnel and medical files and similar files" may be withheld if the disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). To determine whether disclosure would result in a clearly unwarranted invasion of privacy, courts must balance the public interest in disclosure against the intrusion on privacy that would result. See, *e.g.*, *Department of State* v. *Ray*, 502 U.S. 164, 175 (1991); *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 602-603 (1982).

2. Petitioner submitted four FOIA requests to eleven offices of the Internal Revenue Service (IRS) seeking copies of all records pertaining to petitioner or its founder, Larry Klayman. Pet. App. 3. The IRS provided 785 pages in full and 125 redacted pages in response to those requests. *Id.* at 2-3. As relevant here, the IRS redacted, pursuant to Exemption 6 of the FOIA, 5 U.S.C. 552(b)(6), the names of lower-level clerical employees that were contained in correspondence or a correspondence control log. Pet. App. 7, 27.

Petitioner filed suit under FOIA seeking, *inter alia*, an order requiring release of the redacted names of IRS employees. Pet. App. 4, 18. The district court granted the IRS's motion for summary judgment and denied petitioner's cross-motion. *Id.* at 15-33. With respect to the IRS's redaction of employees' names, the district court held that Exemption 6 applies to a broad variety of files containing information that can be identified as applying to an individual. *Id.* at 27. Noting that petitioner did not contest the IRS's redaction, pursuant to Exemption 6, of an employee's telephone number from the requested records, the district court concluded that lower-level employees possessed a similar privacy interest in non-disclosure of their names. *Id.* at 27-28. The court further concluded that petitioner made no showing that "disclosure of the employees' names will provide [it] with information about the government's operations." *Id.* at 28.

3. The court of appeals affirmed. Pet. App. 1-14. The court noted, as an initial matter, that the phrase "similar files," as used in Exemption 6, has been given a broad meaning, consistent with congressional purpose to protect against disclosure of the vast array of personal information that is stored in governmental records. *Id.* at 8 (citing *Washington Post Co.*, 456 U.S.

at 598). Following this Court's decision in *Department of Defense* v. *FLRA*, 510 U.S. 487 (1994), which had held that the addresses of government employees could be withheld under Exemption 6, the court reasoned that the names of lower-level government employees could be protected because disclosure implicated the same privacy interest in not being "disturbed at home by work-related matters" and "control[ing] * * * information concerning his or her person." Pet. App. 9 (quoting *Department of Def.* v. *FLRA*, 510 U.S. at 500-501). The court concluded that the employees' privacy interests were not outweighed by any countervailing public interest in disclosure because petitioner "has offered no explanation as to how the names of lower-level I.R.S. employees would reveal information about the government's operations." *Id.* at 10.

Judge Luttig dissented. Pet. App. 11-14. He would have held that the employees' names did not constitute "personnel[,] medical . . . [or] similar file[s]" within the meaning of Exemption 6. *Ibid.*

ARGUMENT

Petitioner argues (Pet. 8) that this Court should grant review of the court of appeals' "implicit" holding that lower-level employees' names constitute the type of files protected against disclosure by FOIA Exemption 6. That claim does not merit this Court's review for three reasons.

First, petitioner identifies no conflict in the circuits on the question whether Exemption 6 protects against disclosure of the names of lower-level federal employees. In fact, the court of appeals' holding that Exemption 6 is applicable to the employees' names is consistent with the rulings of other circuits. See, *e.g.*, *Lakin Law Firm, P.C.* v. *FTC*, 352 F.3d 1122, 1123-1124

(7th Cir. 2003) (Exemption 6 applies to the identities of consumers who made complaints to the Commission), cert. denied, No. 03-1468, 2004 WL 906614 (June 14, 2004); *Sheet Metal Workers Int'l Ass'n* v. *Air Force*, 63 F.3d 994, 997-998 (10th Cir. 1995) (Exemption 6 protects against disclosure of the names of employees of private contractors performing federal construction projects); *Strout* v. *United States Parole Comm'n*, 40 F.3d 136, 139 (6th Cir. 1994) (Exemption 6 supports redaction of the names of persons who had written to the Parole Commission); *Department of Navy* v. *FLRA*, 975 F.2d 348, 352-353 (7th Cir. 1992) (federal employees' names protected); *FLRA* v. *Department of Veterans Affairs*, 958 F.2d 503, 516 (2d Cir. 1992) (same); cf. *Becker* v. *IRS*, 34 F.3d 398, 404-405 (7th Cir. 1994) (names of IRS employees properly redacted from files relating to taxpayer under FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C)); *FLRA* v. *Department of Treasury, Fin. Mgmt. Serv.*, 884 F.2d 1446, 1456 (D.C. Cir. 1989) (release of federal employees' names would violate the Privacy Act of 1974, 5 U.S.C. 552a), cert. denied, 493 U.S. 1055 (1990); *Stone* v. *FBI*, 727 F. Supp. 662, 664-665 (D.D.C.) (sustaining the withholding of names of federal agents who investigated the assassination of Robert F. Kennedy), aff'd, No. 90-5065, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990).

The courts of appeals have found that the withholding of employee names and similar identifying information is particularly appropriate when, as here, the individuals are lower-level employees. See *Perlman* v. *Department of Justice*, 312 F.3d 100, 107 (2d Cir. 2002) (the rank of a federal employee is one factor to be weighed in assessing the degree of the privacy interest), cert. granted and judgment vacated, 124 S. Ct. 1874 (2004) (directing reconsideration in light of

National Archives & Records Admin. v. *Favish*, 124 S. Ct. 1570 (2004)); *Stern* v. *FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984) (applying the same analysis as *Perlman*).

Second, contrary to petitioner's argument (Pet. 10-14), the court of appeals' ruling protecting names in correspondence and a correspondence log accords with decisions of this Court. See *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997) (per curiam) (Exemption 6 protects against the disclosure of names and addresses in an agency mailing list); *Department of Defense* v. *FLRA*, 510 U.S. 487, 497 (1994) (Exemption 6 protects names and addresses of federal employees); *Department of State* v. *Ray*, 502 U.S. 164, 175-179 (1991) (names of Haitian refugees protected under Exemption 6); *Department of the Air Force* v. *Rose*, 425 U.S. 352, 376-377, 381 (1976) (Exemption 6 protects the names and other identifying information of Air Force Academy cadets, including those who continue to serve as federal employees); see generally *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 600, 601 (1982) (Exemption 6 protects even information that is "not intimate," if the disclosure "might harm the individual") (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)).

Third, the court of appeals' holding is correct. Petitioner devotes substantial effort to challenging what it characterizes as the court's "implicit" holding (Pet. 8) that the names themselves constitute "similar files" under Exemption 6 (Pet. 10-11). The court of appeals had no need to make such a holding, explicitly or implicitly. This Court made clear in *Washington Post*, *supra*, that Exemption 6's protections are triggered by the potential for disclosure of "information which applies to a particular individual," not by "the label of the

file which contains the damaging information." 456 U.S. at 601, 602.

In any event, the names at issue here were contained in correspondence and correspondence logs relevant to the audit records of petitioner, Pet. App. 7-8, and petitioner has not disputed that those audit and related correspondence records constitute "similar files" within the meaning of Exemption 6, see Pet. 7 (asserting that petitioner itself has a privacy interest in the audit records that is protected by Exemption 6). Indeed, petitioner *conceded* that an IRS employee's telephone number was properly withheld under Exemption 6 from the same records at issue here. Pet. App. 27. If, in petitioner's view, the correspondence records constitute "similar files" for purposes of redacting a federal employee's telephone number, they retain that status for purposes of redacting employees' names.

Petitioner also contends (Pet. 13-15) that FOIA's protection of "personal privacy" extends only to the subject of the file. This Court unanimously held exactly the opposite three months ago. *Favish*, 124 S. Ct. at 1576-1578 (FOIA's protection of "personal privacy" includes the interests of family members in controlling death-scene records of their close relatives). That case concerned FOIA's protection of personal privacy in the context of law-enforcement records, 5 U.S.C. 552(b)(7)(C), rather than Exemption 6.[*] But, while the two exemptions "differ in the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions,"

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[*] Section 552(b)(7)(C) of Title 5 exempts from the government's general duty of disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

Department of Defense v. *FLRA*, 510 U.S. at 497 n.6, the types of "personal privacy" interests protected by both exemptions are the same. See *Favish*, 124 S. Ct. at 1579-1580 (explaining that the Court's decision about the scope of Exemption 7's protection of "personal privacy" "is consistent with" court of appeals' holdings providing similar protection for decedents' families under Exemption 6, and citing cases). Indeed, if Congress wanted to limit Exemption 6's protection of privacy to the subject of the records, it likely would have employed the same type of limiting language that appears in the Privacy Act. See 5 U.S.C. 552a(a)(4) (protecting records that are "about an individual"), 552a(b) (prohibiting the disclosure of qualifying records absent the consent of "the individual to whom the record pertains").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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